

**NOV 15 2005****CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****UNITED STATES OF AMERICA,****Plaintiff - Appellee,****v.****EFRAIN FUENTES-HERNANDEZ,****Defendant - Appellant.****No. 05-16237****D.C. Nos. CV-04-2650-JAT  
CR-02-1169-JAT****MEMORANDUM<sup>\*</sup>**

**Appeal from the United States District Court  
for the District of Arizona  
James A. Teilborg, District Judge, Presiding**

**Submitted November 8, 2005<sup>\*\*</sup>**

**Before: WALLACE, LEAVY, and BERZON, Circuit Judges**

Efrain Fuentes-Hernandez, a federal prisoner, appeals pro se the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence for conspiracy to possess heroin with intent to distribute. He contends that under *United States v.*

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*Booker*, 125 S. Ct. 738 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), the district court violated his Sixth Amendment rights in enhancing his sentence based on judge-found facts. This contention is foreclosed because *Booker* does not apply retroactively to convictions that became final prior to its publication. *See United States v. Cruz*, 423 F.3d 1119, 1119-20 (9th Cir. 2005) (per curiam).

**AFFIRMED.**